Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1543

KENNETH E. POWELL,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest with Petitioner Powell in Proceedings Below.

vs.

CARGILL, INC., and STATE ACCIDENT INSURANCE FUND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND J. CONBOY
910 Standard Plaza
Portland, Oregon 97204
Attorney for Petitioner

POZZI, WILSON, ATCHISON, KAHN & O'LEARY,
of Counsel

S U B J E C T I N D E X

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit	1
Opinions Below ----------	2
Jurisdiction ----------	3
Question Presented ----------	4
Statutes Involved ----------	5
Statement of the Case ---------	7
Reasons for Granting the Writ -	14
Conclusion ----------	25
Appendix "A" (Order of the Ninth Circuit filed February 3, 1978) ----------	1
Appendix "B" (Opinion of the Ninth Circuit filed November 17, 1977) ----------	3
Appendix "C" (Decision of the Benefits Review Board filed May 30, 1975) ----------	23
Appendix "D" (Decision and Order of the Administrative Law Judge filed October 11, 1974) -----	35

TABLE OF AUTHORITIES

Page

CASES

Brady-Hamilton Stevedore Co. v. Herron, 568 F2d 137 (CA 9, 1978) 23

Handcor, Inc. v. Kelley, 568 F2d 143 (CA 9, 1978) ---------- 23

International Terminal Operating Co. v. Blundo, 432 US 249 (1977) 4,17

ITO Corp. of Baltimore v. Benefits Review Board, 529 F2d 1080, 1089 (CA 4, 1975), opinion on rehearing, 542 F2d 903 (1976) 8

Northeast Marine Terminal Co. v. Caputo, 432 US 249 (1977) ---- 4,17

Voris v. Eikel, 346 US 328, 333 (1953) ---------- 22

STATUTES

28 USC §1254(1) ---------- 4

29 USC §921(c), Public Law 92-576, Sec. 15(a)(b), 86 Stat. 1261, 1262 ---------- 7

33 USC §902, 86 Stat. 1251 ----- 5

33 USC §902(3) ---------- 5,17

33 USC §902(4), 86 Stat. 1251 -- 5

TABLE OF AUTHORITIES
(Continued)

Page

33 USC §903, 86 Stat. 1251, 1265 6,17

33 USC 919(d) ---------- 7

33 USC 921(b) ---------- 7

33 USC 921(c) ---------- 8

OTHER AUTHORITIES

Hartman, P., Collective Bargaining and Productivity: The Longshore Mechanization Agreement (1969), pp. 45-46 ---------- 15,16

I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

OCTOBER TERM, 1977

No.

KENNETH E. POWELL,

Petitioner,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest with Petitioner Powell in Proceedings Below.

vs.

CARGILL, INC., and STATE ACCIDENT INSURANCE FUND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals

for the Ninth Circuit entered in this case on November 17, 1977.

OPINIONS BELOW

This case arises under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The "Decision and Order" of the Administrative Law Judge filed on October 11, 1974, which has not been officially reported, is appended to this Petition as "Appendix D".

The "Decision" of the Benefits Review Board filed on May 30, 1975, which has been unofficially reported at 1 Benefits Review Board Service (BRBS) 503, is appended to this Petition as "Appendix C".

The Opinion of the United States Court of Appeals for the Ninth Circuit filed on November 17, 1977, which has not yet been reported, is appended to this Petition as "Appendix B".

The "Order" denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, filed by the United States Court of Appeals for the Ninth Circuit on February 3, 1978, which has not been reported, is appended to this Petition as "Appendix A".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 17, 1977. On December 1, 1977, Petitioner filed a Motion for Extension of Time Within Which to File a Petition for Rehearing, and on December 5, 1977, the Court of Appeals granted Petitioner's Motion allowing Petitioner to and including December 8, 1977, within which to file his Petition for Rehearing. On December 1, 1977, Petitioner filed (by mailing) a

Petition for Rehearing and Suggestion for Rehearing En Banc. On February 3, 1978, the Court of Appeals entered its "Order" denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether a longshoreman, injured on shore while employed at a marine grain terminal in the first step of stowing bulk cargo on board a vessel, is entitled to benefits under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, pursuant to this Court's decision in Northeast Marine Terminal Co. v. Caputo, and International Terminal Operating Co. v. Blundo, 432 US 249 (1977), which held that harbor workers injured on shore while engaged in

the final steps of discharging packaged cargo from a marine terminal are covered by the Amendments to the Act.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972:

LHWCA, 33 USC §902, 86 Stat. 1251:

> "§902(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

LHWCA, 33 USC §902(4), 86 Stat. 1251:

> "§902(4). The term 'employer' means an employer any of whose employees are employed in maritive employment, in whole or in part, upon the navigable

waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

LHWCA, 33 USC §903, 86 Stat. 1251, 1265:

"§903(2) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of -

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

* * * * *."

STATEMENT OF THE CASE

Jurisdiction to review the decision of the Benefits Review Board was conferred upon the United States Court of Appeals for the Ninth Circuit by 29 USC §921(c) as amended October 27, 1972, Public Law 92-576, Sec. 15(a)(b), 86 Stat. 1261, 1262. Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, formal hearings on contested issues in claims arising under the Act are conducted before an Administrative Law Judge. 33 USC §919(d). A "party in interest" may appeal a decision of the Administrative Law Judge to a Benefits Review Board consisting of three members appointed by the Secretary of Labor. 33 USC §921(b). Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the

Circuit in which the injury occurred. 33 USC §921(c).

The Solicitor of Labor submitted a brief to the Administrative Law Judge in support of Petitioner's position, filed a Petition for Review before the Benefits Review Board on behalf of the Director of the Office of Workers' Compensation Programs of the United States Department of Labor, and made oral argument in the United States Court of Appeals in support of Petitioner, although Petitioner was also represented by his own attorneys in both the administrative proceeding and review by the Court of Appeals. 1/

1/ The Solicitor of Labor contends that the Office of Workers' Compensation Programs, United States Department of Labor, is a party to contested cases under the Harbor Workers' Act. Petitioner welcomes the Solicitor's support, although there is doubt whether the government is a necessary party in such cases. See ITO Corporation of Baltimore v. Benefits Review Board, 529 F2d 1080, 1089 (CA 4, 1975), opinion on rehearing, 542 F2d 903 (1976).

The facts of this case are accurately set forth in the Opinion of the Administrative Law Judge:

> "On July 22, 1973 the Claimant was a longshoreman working as a 'car tipper' for Cargill, Inc. While using an iron bar to open a gondola to unload grain from a railroad car, he sustained a lumbosacral strain arising out of and in the course of his employment. ***
>
> The Claimant is a registered member of Local 8, International Longshoremen's and Warehousemen's Union, and has been fully registered since 1958. He has worked in all phases of longshoring, for every employer on the waterfront in the Port of Portland. He was hired by Cargill through the hiring hall, which was jointly operated by the employers and the I.L.W.U., Local 8. Although Cargill is not a member of the Pacific Maritime Association, it paid the wages of Claimant and other union members through the bookkeeping facilities of the P.M.A.
>
> Cargill is a grain merchant which buys and sells grain, most of which is exported overseas. Its Portland facilities are located at Terminal 4, where grain it has purchased

is received by rail, trucks and barge. The unloaded grain falls into a conveyer system which carries it to the main elevator, where it is weighed or scaled. It is then conveyed into storage bins.

Most of the grain is ultimately shipped overseas by vessels which operate on navigable waters. However some of the grain is shipped out in railroad cars, and some is conveyed on a belt to a nearby independent flour mill. When grain is received at the facility, it is not segregated in any way for ultimate shipment, but it is stored in bins with like grain. The capacity of the storage facility is eight million bushels. Sixty million bushels of grain it owned were run through the facility by Cargill during fiscal 1973.

Cargill does not itself load the grain destined for overseas export aboard ships, but the actual loading of such grain is performed by longshoremen hired by separate stevedoring companies. Cargill's warehousing facility is adjacent to navigable waters, and the terminal facility is owned by and leased from the Port of Portland, a municipal port authority.

The Claimant had been employed continuously by Cargill for about seven months prior to the accident, and most of that time he had worked as a tipper switchman. The tipper is a device to assist in the unloading of railroad cars carrying grain. Although assigned to a tipper on the day of his injury, the Claimant also helped unload gondola railroad cars which the tipper was not designed to accept. He strained his back while attempting to pry open a gondola. In working as a car tipper, he never had occasion to work aboard a vessel. He had no control over where the grain was conveyed, scaled or sent to storage bins."

The Administrative Law Judge denied coverage upon the ground that the "*** work of unloading grain from railroad cars in this case cannot be regarded as involving maritime employment, or longshoring operations within the meaning of the Act. ***" The Administrative Law Judge stated: "Essential and integral steps in the operation have generally been regarded as parts of the over-all

process of loading or unloading vessels within the meaning of the Act. *** [L]oading must be deemed to commence at that point where the activity is sufficiently contiguous in time and space as to constitute an integral and interrelated part of the process of conveying cargo to vessels."

The Benefits Review Board reversed the Opinion and Order of the Administrative Law Judge, upon the ground that "*** the claimant's duties of unloading grain from railroad cars into the elevators at the employer's terminal was the beginning step of the longshoring operation in maritime employment pursuant to Section 2(3) of the Act." The Board also found that "*** the situs of the claimant's injury was within the geographic boundaries of the employer's marine terminal," a point which the Administrative Law Judge does not appear to have disputed.

The United States Court of Appeals for the Ninth Circuit in turn reversed the Benefits Review Board. Circuit Judges Wright and Lumbard[2/] ruled that the claimant met the situs but not the status test for coverage by the Act. The Court majority reasoned that because Powell had worked as a car tipper for about seven months at the time of the accident, he "*** cannot now claim that he is subject to the 'shifting and fortuitous coverage' in a single workday that concerned Congress."

Judge Anderson, dissenting, was persuaded that Powell met both the status and situs requirements for coverage established by this Court's decision in

---

2/ The Honorable J. Edward Lumbard, Senior United States Circuit Judge, Second Circuit, sitting by designation.

Northeast Marine Terminal Co. v. Caputo, 432 US 249 (1977). Judge Anderson reasoned: "Powell's function was identical to Caputo's in the overall process of loading and unloading, with the only difference being that their jobs were performed at different ends of the spectrum." Judge Anderson was also "*** persuaded by the fact that the Supreme Court repeatedly noted that the Act should be liberally construed, both because the language 'engaged in maritime employment' is broad, and because the Act is remedial legislation."

REASONS FOR GRANTING THE WRIT

The Decision of the Ninth Circuit conconflicts with the letter and spirit of Northeast Marine Terminal Co. v. Caputo, and International Terminal Operating Co. v. Blundo, 432 US 249 (1977), and preserves for marine

grain terminals and other bulk cargo operations, all the confusion concerning shoreward coverage of the LHWCA which this Court sought to minimize in Caputo and Blundo. Marine grain terminals and other bulk cargo terminals line the shores of our rivers, coasts and Great Lakes. They are an important and highly automated[3/] source

3/ "Bulk handling of grain, ore, coke, sugar, potash, salt, and similar goods is capital intensive. Each operation tends to be specialized to the commodity; the bulk methods used with the various goods have little in common other than that they all require rather complex and extensive shoreside facilities. The operations use relatively little labor, and most of it is skilled or specialized. In 1960, bulk-handling facilities loaded or discharged about 40 percent of total Pacific Coast tonnage but used only about 5 percent of the longshore labor. Another group of commodities calls for handling that is intermediate between bulk handling and conventional break-bulk methods. The commodities require much more labor than the former, but more extensive onshore facilities or mobile equipment than the latter. These goods -- copra, bananas, iron and steel scrap, newsprint, and lumber -- accounted for about 15 percent of total tonnage handled and longshore labor used in 1960. Goods handled by bulk facilities and

of maritime commerce and cargoes. The decision of the panel majority below wrongfully excludes from the protection of the Longshoremen's and Harbor Workers' Compensation Act many longshoremen and other harbor workers engaged in the landward steps of stowing and discharging cargo at grain and other bulk cargo marine terminals, and leaves the status of many other such workmen in limbo.

Under the 1972 Amendments, a covered employe is defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations" if injury occurs upon navigable waters including any

3/ (continued)
other special operations are often used to illustrate dramatically the progress of mechanization in cargo handling." Paul T. Hartman, Collective Bargaining and Productivity: The Longshore Mechanization Agreement (1969), pp. 45-46.

"adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 USC §§902(3); 903.

It would seem that this Court has interpreted the Act to cover workmen like Powell. Northeast Marine Terminal Co. v. Caputo, and International Terminal Operating Co. v. Blundo, 432 US 249 (1977). Caputo and Blundo were consolidated appeals by employers from decisions granting benefits under the LHWCA to two workmen, a marine clerk or "checker" (Carmelo Blundo) and a longshoreman (Ralph Caputo). Blundo was injured while checking cargo being removed from a container which had been taken off a vessel at one pier facility and brought overland to the pier where Blundo suffered injury. Caputo was

a longshoreman, regularly employed by a master stevedore, and was hired out to other stevedore companies or terminal operators when his work was not needed. On the date of his injury, Caputo had been hired by a terminal company to work as a "terminal laborer" and was injured while assisting a teamster in loading his truck with cargo which had earlier been discharged from ships at the terminal.

In deciding that benefits had properly been awarded to both Blundo and Caputo, this Court held that there was both a "status" and "situs" test for determining whether a workman satisfies the definition of "employee" for purposes of coverage under the 1972 Amendments to the LHWCA. With respect to "status", the Court's decision recognizes two separate "primary motivations" or "dominant theme[s]" which concerned Congress in extending coverage to

shore-based employes, one of which the Court applied to find coverage for Blundo, and the other for Caputo.

With respect to Blundo, this Court said:

> "One of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoremen's work off the vessel onto land. S. Rep. at 13; HR Rep. at 10. Noted specifically was the impact of containerization. Unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time consuming work of stowage and unstowage to be performed on land in the absence of the vessel. *** In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. ***
>
> It is therefore apparent that respondent Blundo was a statutory 'employee' when he slipped on the ice. His job was to check and mark items of cargo as they were unloaded from a

> container. This task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments. ***"

Since Blundo's work fell within the "dominant theme" of "mechanization," it was immaterial in this Court's analysis whether his work ever took him on board a vessel.

This Court found a second "dominant theme" of the Act in determining that Caputo was covered. The Court held:

> "The Congressional desire to accommodate the Act to modern technological changes is not relevant to Caputo's case, since he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck. Another dominant theme underlying the Amendments, however, assists us in analyzing Caputo's status. Congress wanted a 'uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.'

> S. Rep., at 13; H.R. Rep., at 10-11. It wanted a system that did not depend on the 'fortuitous circumstance that whether the injury [to the longshoreman] occurred on land or over water.' S. Rep., at 13; H.R. Rep., at 11. It therefore extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs.
>
> * * * * *
>
> That Caputo is such a person is readily apparent. As a member of a regular stevedoring gang, he participated on either the pier or the ship in the stowage and unstowage of cargo. On the day of his injury he had been hired by petitioner as a terminal laborer. In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging lighters and barges, and loading and unloading trucks. *** Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his assignment could have changed during the day."

Petitioner Powell, like Caputo, was engaged in the "overall loading and unloading process" at the time of his injury.

Finally, this Court stated, as a general rule of construction of coverage under the Act:

> "The language of the Amendments is broad and suggests that we should takes an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose, and in such a way which avoids harsh and incongruous results.' Voris v. Eikel, 346 US 328, 333 (1953)"

The narrow construction given to the Act and by the panel majority below, is at odds with both the general rationale and specific analysis of coverage issues in Blundo and Caputo. As a result of Blundo and Caputo, it can fairly be said that most terminal workers who handle packaged cargoes are covered by the 1972 Amendments

whether they work on ship or on shore. Brady-Hamilton Stevedore Company v. Herron, 568 F2d 137 (CA 9, 1978); Handcor, Inc. v. Kelley, 568 F2d 143 (CA 9, 1978). However, a decision like that below leaves the rights of harbor workers handling bulk cargo completely in doubt even though they, like workmen handling containerized, packaged cargoes, are employed on the shore because of the "advent of modern cargo-handling techniques."

Terminal workers, like Carmelo Blundo, who handle packaged cargo may never go on board a vessel, but are covered by the Act because of this Court's recognition that one of the "*** primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoreman's work off the vessel onto land." Similarly,

many longshoremen like Petitioner handle grain or other bulk cargoes on shore in the first or final steps of a vessel loading or discharge operation, but do not work upon navigable waters because of modern stowage and discharge methods, although these workmen, like their brethren aboard vessels, share the hazards of a marine terminal operation.

In Caputo and Blundo, the Court resolved many of the coverage questions confronting shore-based workmen who handle packaged cargo. For bulk cargo handlers, the decision of the court below recreates the confusion which antedated Caputo and Blundo.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari to determine whether workmen employed on shore at a marine terminal in the initial steps of stowing

bulk cargo on board a vessel are within the coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Respectfully submitted,

RAYMOND J. CONBOY
Attorney for Petitioner

POZZI, WILSON, ATCHISON, KAHN & O'LEARY,
Of Counsel

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARGILL, INC. and STATE ACCIDENT INSURANCE FUND,	)	No. 75-2655
Petitioners,	)	ORDER
v.	)	
KENNETH POWELL and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondents.	)	

Before: LUMBARD, WRIGHT and ANDERSON, Circuit Judges.

The panel as constituted in the above case has voted to deny respondent Powell's petition for rehearing. Judges Wright and Anderson have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of

the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARGILL, INC. and STATE ACCIDENT INSURANCE FUND,	)	No. 75-2655
Petitioners,	)	
v.	)	OPINION
KENNETH POWELL and DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondents.	)	

On Petition for Review of the Benefits Review Board

BEFORE: LUMBARD*, WRIGHT and ANDERSON, Circuit Judges.

WRIGHT, Circuit Judge:

This petition for review is brought by Cargill, Inc., and its workers' compensation insurer, the State Accident Insurance Fund, pursuant to 33 U.S.C.

§901(c) of the Longshoremen's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §901, et seq., seeking reversal of a decision of the Benefits Review Board. The Board's decision held that an injury suffered by Kenneth E. Powell in the course of his employment with Cargill was within the coverage of the LHWCA and thereby reversed the decision of the administrative law judge who had denied Powell's claim.[1/]

In early 1973 Powell was hired from the union hall, jointly operated by Local 8 of the International Longshoremen's and Warehousemen's Union and the employers in the Port of Portland, to work for Cargill at its grain handling facilities at Terminal 4, a public dock facility owned by the Port and situated on the Willamette River. The longshoremen employed by

Cargill were hired as "key men" which meant that they could perform any of the several tasks involved in the operation and maintenance of all grain handling equipment at the facility. Their work did not include work aboard the ships.

The employer, Cargill, Inc., is in the business of buying and selling grain, most of which is exported overseas. The grain purchased by Cargill is received at Terminal 4 by rail, truck and barge. Once received, the grain is unloaded and delivered by conveyor belts to bins where it is stored. When a ship is ready for loading the grain is conveyed again to the scales, and then to the ship. The actual distribution of grain into the ship's hold is done by independent stevedoring companies. If a ship was being loaded as grain was being received, the grain would be

conveyed directly through the scales to the ship.

On the day of his injury, July 22, 1973, Powell had been continuously employed by Cargill for about seven months. During most of these seven months, and on the day of his injury, he worked as a "tipper" switchman. The "tipper" is a device used to assist in the unloading of railroad gondola cars and when such cars arrived, Powell would assist in the unloading of them. He injured his back while attempting to open one of the cars.

The sole issue before this court is whether Powell's claim is within the coverage of the LHWCA, as amended in 1972.

Northeast Marine Terminal Co. v. Caputo, ___ U.S. ___ (June 17, 1977, 45 U.S.L.W. 4729), goes a long way to defining to whom the LHWCA applies, but there

remains a gray area where maritime activity blends into the non-maritime. This case lies in that murky area.

In Northwest Marine Terminal, the Supreme Court was confronted with the question of coverage under the LHWCA over injuries sustained by two workmen, Carmelo Blundo and Ralph Caputo. On the day of his injury, Blundo was assigned as a "checker" whose responsibility was to check and record cargo as it was loaded onto or unloaded from vessels, barges, or containers. A container is a large metal box capable of carrying large amounts of cargo destined for one or more consignees. When a container carried goods for several different consignees, it would have to be unloaded or "stripped" and the goods would be sorted. Blundo, while recording cargo stripped from a container, was injured when

he slipped on some ice on the pier. On the day of his injury Caputo was helping consignee's truckmen load their trucks with cargo. Caputo sustained his injury while rolling a dolly full of cargo into the consignee's truck.

The Supreme Court began its analysis with an extensive review of the legislative history of the LHWCA in general and of the 1972 amendments in particular. According to the Court, Congress, in amending the Act in 1972, had two concerns in mind: (1) "to adapt the LHWCA to modern cargo handling techniques,...specifically ...the impact of containerization," and (2) "to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered for only part of their activity." 45 U.S.L.W. at 4735.

The Supreme Court found that Congress, by broadening the definition of the geographical boundaries of coverage and by amending the definition of the class of persons covered, "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." 45 U.S.L.W. at 4733. Applying this "situs-status" test, the Court found that Blundo's and Caputo's injuries were sustained within the broadened geographical area of coverage and that their job assignments were within the modernized category of "longshoring operations."

Our task here is to determine the proper application of the "situs-status" test to the facts of this case, always bearing in mind the dominant themes of

the 1972 amendments. This undertaking is not a simple one since Powell's job, unlike the two jobs involved in Northeast Marine Terminal, does not neatly fit into either of the two themes that the Court recognized.

Turning first to the "situs" requirement, we believe there can be little doubt that Powell's injury was within the geographic boundaries of the employer's marine terminal. Powell's injury, like Caputo's, was sustained in the terminal area, which, at least in part, was used in loading and unloading ships. That is sufficient to satisfy the "situs" requirement, as defined by the Court in Northeast Marine Terminal.

We now turn to the more difficult question whether Powell has satisfied the "status" requirement. Powell might well

have been occupationally classified as a longshoreman for seventeen years, but here we must look to his employment status at the time of the accident.[2/] As noted above, Powell was employed by a grain merchant to unload railroad cars transporting grain from inland points. He had worked in this position for about seven months at the time of the accident. After being unloaded, the grain was weighed, and then usually was stored for varying periods of time before being loaded aboard ship.[3/]

The Supreme Court noted that "when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." 45 U.S.L.W. 4735. The Court found that Caputo was such a

person by focusing on the fact that he could have been assigned to any one of a number of tasks throughout a single workday and that to deny coverage for one task while including coverage for another "would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." Id.

In the past it might have been customary for Powell to hire himself out to employers on an irregular basis, and some of his work may have been indisputably maritime. At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the loading or unloading of any ship, nor is there any evidence that such genuine maritime work was even con-

templated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea.

The policy pointed to by the Supreme Court in Northeast Marine Terminal to explain Congress's extension of the Act to employers who spend a part of their workday in nonmaritime activity cannot support coverage for Powell. Having served seven months of continuous, nonmaritime employment, with no indication that termination of that employment was contemplated, Powell cannot now claim that he is subject to the "shifting and fortuitous coverage" in a single workday that concerned Congress.[4/]

We grant the petition for review, and remand for reinstatement of the decision of the administrative law judge denying benefits to the employee.

FOOTNOTES

* The Honorable J. Edward Lumbard, Senior United States Circuit Judge, Second Circuit, sitting by designation.

1/ The Board's decision is reported at 1 BRBS 503.

2/ Similarly, it is not relevant that Powell is a registered member of the International Longshoremen's and Warehousemen's Union, or that he worked in virtually all phases of the longshoring operation for every employer in the Port of Portland. We cannot concern ourselves with the entire span of a claimant's career.

3/ It is also not relevant that a ship may have been in the process of being loaded by the stevedores at the time of the accident. Whether or not a ship was being loaded could have had no effect on the nature of Powell's duties. His responsibilities only involved unloading the grain from the rail cars to be conveyed to the scales. Whether the grain then went to storage bins, to ships, or to carriers for inland shipment was not a concern of Powell's. Indeed, this point serves to reinforce the view that Powell's duties involved only nonmaritime work.

4/ This is not to say that an employee whose duties shifted from the maritime to the nonmaritime over a period of time greater than a single workday is never covered by LHWCA. We only note that in

Northeast Marine Terminal, supra, the Supreme Court focused on an employee whose duties shifted throughout a single working day. We do not decide whether an employee whose duties shifted every week, or every month, may still qualify under the Act. That determination must be left to development in future cases.

CARGILL, INC., and STATE ACCIDENT INSURANCE FUND v. POWELL No. 75-2655

ANDERSON, dissenting:

In finding that Powell was not covered by the Act, the majority focuses upon his employment status at the time of the accident and concludes that his activities were "more oriented to the rails than to the sea." Believing that Powell's status at the time of the accident was identical to Caputo's in the overall process of loading and unloading, although performed at different ends of the spectrum, I respectfully dissent.

It should be noted that in Northeast Marine Terminal, supra, the Supreme Court, by focusing on the fact that Caputo could have been assigned to any one of a number of "longshoring" tasks on the day of his injury, did not have to decide the issue

before this panel, i.e., whether Caputo's specific unloading task was covered under the Act. However, in my opinion the Court indicated that that part of Caputo's job would be covered, even if the other tasks performed were not indisputably longshoring operations.

First of all, the Court rejected the point of rest theory as too restrictive. From this it is clear that coverage, in the case of loading, is extended beyond the point where the stevedoring operation begins and the terminal operation ends. The Court also reiterated the only example of work, found in the legislative history that Congress intended to exclude -- employees "whose responsibility is only to pick up stored cargo for further transhipment." 45 U.S.L.W. at 4736, n. 37. The Court found that this example did not refer

to Caputo, but is limited to "workers such as the consignee's truck drivers Caputo was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." 45 U.S.L.W. at 4736, n. 37. By analogy to Caputo's job, this example does not pertain to Powell. The purpose of Powell's presence at the terminal was not that of delivering cargo for further shipment by sea, but rather to initiate the process whereby this delivered cargo was loaded onto a ship.1/ Powell's function was identical to Caputo's in the overall process of loading and unloading, with the only difference being that their jobs were performed at different ends of the spectrum.

I am also persuaded by the fact that the Supreme Court repeatedly noted that the Act should be liberally construed,

both because the language "engaged in maritime employment" is broad, and because the Act is remedial legislation. The Court noted that this broad language "suggests that we take an expansive view of the extended coverage" since "such a construction is appropriate for this remedial legislation." 45 U.S.L.W. at 4734. I believe that a liberal construction supports the Board's finding "that the claimant's duties of unloading grain... was the beginning step of a longshoring operation in maritime employment." I believe that to hold otherwise would be to return to the "hop-scotch" effect that the 1972 amendments were designed to eliminate.

The Petition for Review should be denied.

FOOTNOTES

1/ The majority also finds that it is irrelevant that a ship may have been in the process of being loaded at the time of the accident. There was circumstantial evidence that at the time of Powell's injury, a ship was present and being loaded. Mr. Powell testified as follows:

> "Q Mr. Powell, do you know whether or not there was a vessel there at the time of your injury?
>
> A Well, I thought there was one there. I'm not sure. I'm not going to - - - I mean - - -.
>
> Q It doesn't make any difference to you?
>
> A As I say, at the time I thought there was a ship there because, if it wasn't there - - - I mean, the older guys would have been down there working the tipper and stuff like that, and like I say, I was towards the tail end of the layoff deal." (R.T. 34).

I also note that this evidence stands unrebutted by Cargill, even though it was within its power by its own records to demonstrate the reliability or unreliability of Powell's assertion. Accepting

Powell's unrebutted version, though somewhat equivocal, I would conclude that some of his activities, like Caputo's in Northeast Marine Terminal, infra, were indisputably "longshoring operations," i.e., loading a ship even though his activity was confined to land. It was the beginning point of loading in the same sense that Caputo's activities were the ending point of unloading. To put it another way, could this ship have been loaded if no one had performed Powell's function?

APPENDIX C

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

KENNETH E. POWELL Claimant-Petitioner v. CARGILL, INC. and STATE ACCIDENT INSURANCE FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner.	)	BRB Nos. 74-206 and 74-206A DECISION

Appeal from Decision and Order of Marshall E. Miller, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison), Portland, Oregon, for claimant.

Robert E. Babcock (Lindsay, Nahstoll, Hart, Duncan, Dafoe & Krause), Portland, Oregon, for employer.

Kenneth L. Kleinsmith (Department of Justice), Portland, Oregon for employer/ carrier.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members

Washington, Chairperson:

These appeals by the claimant and Director, Office of Workers' Compensation Programs, United States Department of Labor (hereafter referred to as the Director), seek review and reversal of a Decision and Order (74-JHCA-142) of Administrative Law Judge Miller, filed October 11, 1974, denying compensation benefits. This claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq., as amended (hereafter referred to as the Act).

The claimant, a longshoreman, injured his back on July 22, 1973 while in the course of his employment. He sustained a lumbosacral strain while unloading a railroad car at the employer's grain terminal. That grain terminal is located within and is part of the Port of Portland's Terminal No. 4 which is located adjacent to and over navigable waters. The claimant was temporarily totally disabled from the date of the injury until September 19, 1973.

The only issue before the administrative law judge was whether the claimant's employment came within the scope of Section 2(3), 33 U.S.C. §902(3), at the time of his injury. The administrative law judge found the claimant not to be engaged in maritime employment or longshoring operations at the time of his injury.

The claimant has been a longshoreman since 1956 and has been fully registered since 1958. He was hired by the employer to work in its terminal facility about seven months before his injury. On the day of that injury, he was operating the car tipper and also unloading gondola cars of grain.

All of the employees at the employer's Portland Terminal except for a small number of supervisory and clerical employees are longshoremen. These longshoremen are hired through a hiring hall operated jointly by the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association.

The employer, a grain merchant, is primarily engaged in the exporting of grain from its Portland Terminal via navigable waters. The grain terminal has

a bulk grain storage capacity of eight million bushels. During the 1973 fiscal year, the employer shipped approximately 60 million bushels from that facility. The bulk grain is transported to the terminal and is unloaded from railroad cars, trucks and barges. Longshoremen employed by the employer did not work aboard barges or vessels during unloading and loading operations. Those duties were performed by employees of an independent stevedoring company.

The claimant and the Director have filed separate appeals alleging that the claimant's duties of unloading grain from railroad cars into the employer's grain terminal storage area was the first essential step in the process of loading the grain for export. Both parties contend therefore that the claimant was engaged

in a longshoring operation as contemplated in Section 2(3) of the Act.

The standard of review for this Board as prescribed in Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3), and the law as summarized in O'Keeffe v. Smith Associates, 380 U.S. 359 (1965), require the Board to affirm the Decision of the administrative law judge when that Decision is supported by substantial evidence, is not irrational and is in accordance with law.

The only issue before the Board is whether the claimant was engaged in a longshoring operation so as to be classified as being engaged in maritime employment pursuant to Section 2(3) of the Act.

The determination of the issue of coverage as raised in these appeals rests on the definition of "employee" in Section 2(3) of the Act. That Section

provides in part:

> The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations....

The purpose of adding the requirement that a person be engaged in maritime employment to that Section of the Act was to exclude from coverage those employees who were not employed in the longshoring industry but sustained an injury while on a pier, wharf, dry dock terminal or other areas adjoining navigable waters. Gilmore v. Weyerhaeuser Co., 1 BRBS 180, BRB No. 74-141 (Nov. 12, 1974). The Act does not however require an employee to be engaged in loading or unloading of a vessel in order to be engaged in longshoring operations. Coppolino v. International Terminal Operating Company, Inc., 1 BRBS 205, BRB No. 74-136 (Dec. 6, 1974).

An employee who is working as a longshoreman, such as the claimant, may be within coverage of the Act if he is found to be engaged in "longshoring operations".

The purpose of the employer's Portland Terminal facility is for the temporary storage and protection of grain while awaiting shipment over navigable waters. The process of handling grain in bulk form is primarily for the convenience of the employer for storage and shipping.

Section 20 of the Act, 33 U.S.C. §920, creates the presumption that in absence of substantial evidence to the contrary an injury occurring in the course of employment comes within the coverage of the Act. Ekar v. International Union of Operating Engineers, 1 BRBS 406, BRB No. 74-209 (Apr. 11, 1974); Travelers Insurance Company v. Donovan,

221 F.2d 886 (D.C. Cir. 1955). The Board agrees that the presumption created by Section 20 of the Act is neither absolute nor irrebuttable except that the presumption places the burden on the employer to go forward with the evidence to meet that presumption. Toran v. Liberty Mutual Insurance Company, 1 BRBS 421, BRB No. 74-188 (Apr. 15, 1975); Wheatley v. Alder, 407 (D.C. Cir. 1968).

Based on the record before this Board, it is clear that the primary purpose of the employer's grain terminal was for temporary storage of bulk grain while awaiting export by vessels operating on navigable waters. The presumption contained in Section 20 of the Act places the burden on the employer to prove that the specific carload of grain that the employee was unloading at the time of his

injury was not for export. The Board finds that the employer failed to introduce substantial evidence that the claimant's injury did not arise out of and in the course of his employment so as to meet the presumption created in Section 20 of the Act. The administrative law judge found that most of the grain is ultimately exported by vessels operating on navigable waters.

The Board finds that the claimant's duties of unloading grain from railroad cars into the elevators at the employer's terminal was the beginning step of a longshoring operation in maritime employment pursuant to Section 2(3) of the Act.

Because the Board has found that the claimant is an "employee" within the meaning of Section 2(3) of the Act, it follows that his employer is an "employer" within the meaning of Section 2(4) of the Act, 33

U.S.C. §902(4). Harris v. Maritime Terminals, Inc., 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

The record in this case indicates that the situs of the claimant's injury was within the geographic boundaries of the employer's marine terminal. A terminal is one of the areas to which coverage of the Act was extended by the 1972 amendments to Section 3(a) of the Act, 33 U.S.C. §903(a). Harris v. Maritime Terminals, Inc., supra.

The Board holds that the finding of the administrative law judge that the claimant was not engaged in a longshoring operation or in maritime employment at the time of his injury is not supported by substantial evidence in the record as a whole and is not correct as a matter of law.

The Decision and Order appealed from is reversed and the case is remanded to the Office of the Administrative Law Judges for the entry of an appropriate award of compensation under the Act.

s/ Ruth V. Washington
Ruth V. Washington, Chairperson

s/ Ralph M. Hartman
Ralph M. Hartman, Member

s/ Julius Miller
Julius Miller, Member

Dated this 30th day
of May, 1975

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of	:	
KENNETH E. POWELL,	:	
Claimant	:	Case No. 74-LHCA-172 Formerly Case No. 14-14529
vs.	:	
CARGILL, INC.	:	
Employer	:	
STATE ACCIDENT INSURANCE FUND	:	
Carrier	:	

Donald R. Wilson, Esquire
Pozzi, Wilson and Atchison
Suite 808 Standard Plaza
Portland, Oregon 97204
For the Claimant

Robert E. Babcock, Esquire
Lindsay, Nahstoll, Hart, Duncan,
Dafoe and Krause
1313 SW Broadway
Portland, Oregon 97205
For the Employer

Kenneth L. Kleinsmith, Esquire
Assistant Attorney General
Department of Justice
State of Oregon
555 State Office Building
Portland, Oregon 97201
For the Employer and Carrier

Joshua T. Gillelan, II, Esquire
(William J. Kilberg, Solicitor of Labor)
For the Director, Office of Workers' Compensation Programs
United States Department of Labor
Party in Interest

BEFORE: MARSHALL E. MILLER
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended (hereafter the "Act"), 33 U.S.C. 901 et seq., a hearing was held in Portland, Oregon on August 12, 1974. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, to examine witnesses and to make oral argument. Thereafter the parties submitted briefs, which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their appearance and demeanor, and from all other evidence adduced at this hearing, I make the following Findings of Fact, Conclusions of Law, and Order.

Facts

On July 22, 1973 the Claimant was a longshoreman working as a "car tipper" for Cargill, Inc. While using an iron bar to open a gondola to unload grain from a railroad car, he sustained a lumbosacral strain arising out of and in the course of his employment. There was temporary total disability from the date of injury until September 19, 1973. The average weekly wage was $394.00, entitling him to the maximum benefits if there was coverage under the Act. The Employer contends that this claim is covered by the Oregon Workmen's Compensation Law.

The Claimant is a registered member of Local 8, International Longshoremen's and Warehousemen's Union, and has been fully registered since 1958. He has worked in all phases of longshoring, for every employer on the waterfront in the Port of Portland. He was hired by Cargill through the hiring hall, which was jointly operated by the employers and the I.L.W.U., Local 8. Although Cargill is not a member of the Pacific Maritime Association, it paid the wages of Claimant and other union members through the bookkeeping facilities of the P.M.A.

Cargill is a grain merchant which buys and sells grain, most of which is exported overseas. Its Portland facilities are located at Terminal 4, where grain it has purchased is received by rail, trucks and barge. The unloaded grain falls into

a conveyer system which carries it to the main elevator, where it is weighed or scaled. It is then conveyed into storage bins.

Most of the grain is ultimately shipped overseas by vessels which operate on navigable waters. However some of the grain is shipped out in railroad cars, and some is conveyed on a belt to a nearby independent flour mill. When grain is received at the facility, it is not segregated in any way for ultimate shipment, but it is stored in bins with like grain. The capacity of the storage facility is eight million bushels. Sixty million bushels of grain it owned were run through the facility by Cargill during fiscal 1973.

Cargill does not itself load the grain destined for overseas export aboard ships, but the actual loading of such grain is performed by longshoremen hired by separate stevedoring companies. Cargill's warehousing facility is adjacent to navigable waters, and the terminal facility is owned by and leased from the Port of Portland, a municipal port authority.

The Claimant had been employed continuously by Cargill for about seven months prior to the accident, and most of that time he had worked as a tipper switchman. The tipper is a device to assist in the unloading of railroad cars carrying grain. Although assigned to a tipper on the day of his injury, the Claimant also helped unload gondola railroad cars which the tipper was not designed to accept. He

strained his back while attempting to pry open a gondola. In working as a car tipper, he never had occasion to work aboard a vessel. He had no control over where the grain was conveyed, scaled or sent to storage bins.

OPINION

The major question presented is whether this claim is within the coverage of the Act under the 1972 amendments, which extended coverage to certain shoreside injuries involving maritime employment. The Employer and Carrier contend that the Claimant at the time of the accident was not an employee engaged in maritime employment, and that his injury did not occur in a locus covered by the Act.

This problem can best be approached by considering the changes Congress sought to effect in adopting the amendments. Prior to such amendments, geographical "situs" alone was controlling with respect to coverage, without regard to the type of work being performed.

If an employee was injured or killed on the "navigable waters of the United States" he was covered, if he was working for an employer who had any employees engaged in maritime employment. It did not matter whether the claimant himself was engaged in maritime employment, if the situs test was met. 1/

1/ Peter v. Arrien, 325 F.Supp. 1361 (E.D. Pa.), aff'd 463 F.2d 252 (1971); Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S. Ct. 1196 (1962); Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S. Ct. 302 (1953)

Nacirema Operating Co. v. Johnson, 369 U.S. 212, 90 S. Ct. 247 (1969), was the Supreme Court's last interpretation of this aspect of the Act prior to the 1972 amendments. The court rejected a contention that an employee could fulfill the coverage requirements by either the "situs" test, or by having the "status" of a longshoreman engaged in maritime employment. It was held that Congress had based coverage on locality or situs alone, and hence recovery was denied to longshoremen injured on a dock, although they were engaged in ship loading operations. The court stated that it was for Congress, not the court, to move the "line of demarcation" of jurisdiction landward.

Such extension of coverage landward was accomplished by three of the 1972 amendments to the Act. 33 U.S.C. 902(a) provides:

> "Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

The definition of an "employer" was also expanded to cover the same specified adjoining shoreside facilities (33 U.S.C. 902[4]), and an "employee" was defined as any person engaged in maritime employment (33 U.S.C. 902[3]).

Accordingly, the net effect of these 1972 amendments was to expand "situs" to include adjoining shoreside facilities, but to contract "status" to require that an employee himself be engaged in maritime employment in order to be covered by the Act.

The work of unloading grain from railroad cars in this case cannot be regarded as involving maritime employment, or longshoring operations within the meaning of the Act. It is true that the term "loading" is not to be given a narrow or hypertechnical interpretaion. 2/ Accordingly, coverage has been found where cargo was being unloaded from a railroad freight car, to be taken to temporary storage on a pier and to be loaded aboard a specified vessel in a matter of several days. 3/ And the advance assembly and containerization of cargo for loading aboard a ship have been held to involve maritime employment. 4/ However, Congress did not intend "to cover employees who are not

---

2/ Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp 812 (E.D. Pa., 1959).

3/ Scalmato v. Northeast Marine Terminal Co., 74 LHCA 203 (Sept. 24, 1974).

4/ Brown v. Maritime Terminals, Inc., 74 LHCA 207 (August 22, 1974).

engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. 5/ Engagement in maritime employment at the time of injury is essential, regardless of whether the accident occurs on navigable waters or on adjoining shoreside facilities otherwise covered by the Act.

Essential and integral steps in the operation have generally been regarded as parts of the over-all process of loading or unloading vessels within the meaning of the Act. 6/ However, there must be a reasonable point where the loading or unloading process starts or ends. Congress did not intend to enact a nation-wide federal workmen's compensation act, nor to extend coverage to other than maritime commerce and employment. Consequently, loading must be deemed to commence at that point where the activity is sufficiently contiguous in time and space as to constitute an integral and interrelated part of the process of conveying cargo to vessels.

In the instant case, the evidence shows that the grain unloaded from the railroad gondola by the Claimant was transported by conveyers to the main elevator

5/ S. Rep. No. 92-1125, 92d Cong. 2d Sess. 13 (1972)

6/ Avvento v. Hellenic Lines, Ltd., 74 LHCA 63 (June 27, 1974)

for weighing, and immediately conveyed to storage bins. There this fungible commodity was added to or mixed with other similar grain. Cargill had purchased this grain as a grain merchant, and it went to storage in an elevator or storage bin until it was sold and shipped to the ultimate purchaser.

The storage facilities were substantial, having the capacity to store eight million bushels of grain. Such storage was of indefinite duration, until the grain was sold and ultimately shipped. Although the majority of it was eventually exported overseas, some of the grain was either shipped out by railroad, or conveyed directly to a nearby independent flour mill for processing. When received the grain was not segregated for any particular ship, nor otherwise designated for any specific purchaser or consignee. Accordingly, the Claimant was not engaged in maritime employment or longshoring work, loading ships or otherwise, at the time of his injury.

Claimant's counsel purports to view a negative finding as an application of the statutorily-abandoned water's edge doctrine. However, this argument misses the point. Under the 1972 amendments, even if an injury occurs upon navigable waters, there must be maritime employment to give jurisdiction under the Act. Hence the status requirement can be no less when the injury takes place on adjoining shoreside facilities, as here.

The fact that the Claimant was a longshoreman for many years, or that the union contract was over-broad in defining longshoring duties, cannot be controlling. It is the nature of the work being performed, not the label given it by either party, which is decisive. 7/ Otherwise job titles or self-serving appellations would determine jural relations.

Finally, the Claimant cites four ALJ cases as showing that the same issues have previously been raised by employers or carriers, and in each instance they have lost. 8/ However, these cases were significantly different on the facts from the instant case. Cramptom involved a longshoreman working as a millwright at the same Cargill facility. At page 12 of the opinion the administrative law judge stated:

> "Moreover, the evidence is uncontroverted that the Claimant was injured while working to free grain from a storage tank, so that it could be carried to a waiting ship for export."

7/ Olvera v. Michalos, 307 F. Supp 9 (S.D. Texas, 1968).

8/ Crampton v. Cargill, Inc., 74 LHCA 215 (July 31, 1974); Palmer v. Kerr Grain Corporation, 74 LHCA 208 (July 31, 1974); Herron v. Brady-Hamilton Stevedore Co., 74 LHCA 111 (July 23, 1974); and Martin v. Marine Terminals Corp., 74 LHCA 204 (August 23, 1974).

Palmer also involved a longshoreman working as a millwright at a simlar grain terminal. Here too at the time of the injury a vessel was being loaded with grain for export, and the employee was repairing a "leg" which was leaking grain while it was being moved aboard the ship.

Herron involved injuries to a gear lockerman, whose duties included the repair and maintenance of equipment used in loading and unloading operations, requiring him to go aboard ship or into the hold of a ship from time to time. And Martin was a containerization case involving a ship's clerk who was checking cargo being loaded into containers by longshoremen. Obviously these cited cases had a close nexus with the loading and unloading of ships and constituted maritime employment. By the same token, recovery has been denied where the status and situs tests have not been met. 9/

Inasmuch as the substantial evidence of the entire record shows that the Claimant was not engaged in maritime employment at the time of his injury, after giving him the benefit of all reasonable

9/ Perdue v. Jacksonville Shipyards, Inc., 74 LHCA 58 (September 19, 1974); Ford v. P.C. Pfeiffer Company, 74 LHCA 181 (August 29, 1974); Gilmore v. Weyerhaeuser Company, 74 LHCA 84 (May 17, 1974).

presumptions in favor of coverage under §20 of the Act, this claim is not within the jurisdiction of and is not compensable under the Act.

For the reasons set forth above, this claim is hereby denied.

s/ Marshall E. Miller
Marshall E. Miller
Administrative Law Judge

Dated: October 8, 1974
Washington, D.C.

Supreme Court, U. S.
FILED
JUN 20 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1543

KENNETH E. POWELL,

Petitioner,

and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest with Petitioner Powell in Proceedings Below,

v.

CARGILL, INC. and STATE ACCIDENT INSURANCE FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DENNIS LINDSAY
ROBERT BABCOCK
1331 S. W. Broadway
Portland, Oregon 97201
(503) 226-1191
Attorneys for Respondents

LINDSAY, NAHSTOLL, HART, NEIL & WEIGLER
of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-78

INDEX

	Page
Question Presented	1
Statement	2
Argument	4
I. There Is No Conflict with Caputo	5
II. There Is No Conflict With Other Circuit Court Decisions	9
Conclusion	13

TABLE OF AUTHORITIES

Page

Cases

Alabama Dry Dock Shipbuilding Co. v. *Kininess*, 554 F.2d 176 (5th Cir. 1977), cert. den. — U.S. —, — S. Ct. —, 54 L. Ed. 2d 190 ..... 10, Fn. 6

Brady-Hamilton Stevedore Co. v. *Herron*, 568 F.2d 137 (9th Cir. 1978) ..... 9, Fn. 5; 10, Fn. 6

Crosson v. *Vance*, 484 F.2d 840 (4th Cir. 1973) .. 12

Dravo Corp. v. *Banks*, 567 F.2d 593 (3rd Cir. 1977) 10, 11

Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 (1972) 5, 12, 13

Handcor, Inc. v. *Director, Office of Workers' Compensation Programs*, 568 F.2d 143 (9th Cir. 1978) ..... 9, Fn. 5

Newport News Shipbuilding & Drydock Co. v. *Director, Office of Workers' Compensation Programs*, 4th Cir. Docket No. 76-2297, March 13, 1978, 8 B.R.B.S. 241 ..... 10, 11

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) ..... 2, Fn. 1; 4, 5, 6, 7, 8, 9, 10, 13

Onley v. *South Carolina Electric & Gas Company*, 488 F.2d 758 (4th Cir. 1973) 12

Weyerhaeuser Company v. *Gilmore*, 528 F.2d 957 (9th Cir. 1976), cert. den. 429 U.S. 868 12

Statutes

33 U.S.C. § 902(3) 2, 3, 12

In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77-1543

KENNETH E. POWELL,

Petitioner,

and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest with Petitioner Powell in Proceedings Below,

v.

CARGILL, INC. and STATE ACCIDENT INSURANCE FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether a worker engaged in the unloading of railroad gondola cars bringing grain to a waterfront grain elevator and having no involvement whatsoever

with the loading or unloading of vessels is engaged in "maritime employment" within Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

This litigation concerns the workers' compensation entitlement of one employee[1] of a Portland, Oregon grain elevator. The individual was hired in early 1973 to work continuously as a "keyman" (i.e., steady employee) and to perform any of the tasks involved in the operation and maintenance of a grain handling facility *except* the loading and unloading of vessels. After nearly seven months of continuous employment having no involvement whatsoever with the genuinely maritime work of vessel loading or unloading, petitioner was injured while opening a railroad gondola car bringing grain to the facility.

Following his injury and while receiving the benefits afforded by the State of Oregon's workers' compensation act, petitioner asserted entitlement to the benefits of the Longshoremen's and Harbor Workers' Compensation Act (the "Act").

---

[1] The employee is characterized as a "longshoreman" throughout the Petition. That characterization both presumes the answer to the question presented and is derived from petitioner's membership in the International Longshoremen's and Warehousemen's Union:

> "We find consideration of the purposes (of the Act) more enlightening than looking simply at whether respondents belong to the International Longshoremen's Union. . . . We cannot assume that Congress intended to make union membership the decisive factor. The vagaries of union jurisdiction are unrelated to the purposes of the Act. . . ." *(Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, at 269, Fn. 30 (1977)).

Respondent's denial of that entitlement was upheld by the Administrative Law Judge who, following formal hearing, concluded that

> ". . . petitioner's work was not . . . sufficiently contiguous in time and space as to constitute an integral and interrelated part of the process of conveying cargo to vessels." (Appendix D to Petition, p. 42).

On review, the Benefits Review Board reversed the Administrative Law Judge, concluding that petitioner's duties were

> ". . . the beginning step of a longshoring operation in maritime employment pursuant to Section 2(3) of the Act." (Appendix C to Petition, p. 32).

On further review, the Court of Appeals for the Ninth Circuit reinstated the Administrative Law Judge's findings that petitioner's work activities and duties did not bring him within the coverage of the Act:

> "At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the loading or unloading of any ship, nor is there any evidence that such genuine mari-

time work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (Appendix B to Petition, pp. 12-13).

ARGUMENT

Despite petitioner's attempt to balloon the significance of the Ninth Circuit's decision to affect all bulk cargo facilities of this nation's "rivers, coasts and Great Lakes," this case involves only the Ninth Circuit's application of this Court's decision in *Caputo* to that particular set of facts found by the Administrative Law Judge.

The Petition itself underscores the fact that the work performed by Powell and other similar shoreside grain elevator employees at Cargill's Portland, Oregon facility has "little in common" with other types of bulk cargo operations in other geographic areas. (Petition, pp. 15-16, Fn. 3).

A factual determination regarding the particular work and duties of an employee injured while opening the door to a railroad car at a Portland, Oregon grain elevator will not significantly affect the compensation entitlement of other employees performing different

work under different collective bargaining contracts under conditions having little in common with local practices.[2]

Not only is the Ninth Circuit's decision based on and limited to a specific work situation, it is fully consistent with this Court's decisions in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), and with the few post-*Caputo* decisions issued by several Circuit Courts of Appeal.

I.

There Is No Conflict with Caputo.

The Petition characterizes the Court's decision below as

> ". . . at odds with both the general rationale and the specific analysis of coverage issues in *Blundo* and *Caputo*." (Petition, p. 22).

The characterization is inaccurate. The Ninth Cir-

---

[2] The collective bargaining agreement between Cargill and petitioner's local union is separate and distinct from the collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union which controls the employment of the vast majority of West Coast longshoremen performing vessel loading and unloading activities, including many terminal operations, for stevedore companies. Cargill neither loads nor unloads vessels and is not a member of the Pacific Maritime Association. See Tr. 40-41.

cuit's decision is in full conformance with both the letter and spirit of that decision.

The Ninth Circuit's analysis of *Caputo* (which takes up seven pages of the 14-page majority decision appearing at Appendix B of Petition, pp. 3-16), identified and acknowledged the major concerns which this Court found Congress had in mind at the time of the 1972 amendments:

> "The Supreme Court began its analysis with an extensive review of the legislative history of the LHWCA in general and of the 1972 amendments in particular. According to the Court, Congress, in amending the Act in 1972, had two concerns in mind: (1) 'to adapt the LHWCA to modern cargo handling techniques, . . . specifically . . . the impact of containerization,' and (2) 'to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered for only part of their activity.' 45 U.S.L.W. at 4735." (Appendix B to Petition, p. 8).

Moreover, the Ninth Circuit completely adopted this Court's mandate that the Act's coverage be interpreted to avoid "the shifting and fortuitous coverage that Congress intended to eliminate." (Appendix B to Petition, p. 13), recognizing that

> "'. . . when Congress said it wanted to cover "longshoremen" it had in mind persons whose employment is such that they spend at least some

> of their time in indisputably longshoring operations.' 45 U.S.L.W. 4735." (Appendix B to Petition, p. 11).

In reaching its conclusion that work having "no involvement whatsoever with the loading and unloading of . . . ships"[3] was not "maritime employment," and denying petitioner's claim to the Act's benefits, the Ninth Circuit Court of Appeals not only recognized the lessons provided by this Court in *Caputo*, it applied those lessons rigorously.

In *Caputo*, this Court identified two "dominant themes" underlying the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act and the adoption of a "maritime employment" test for compensation entitlement:

> *First*, to extend the Act's coverage shoreward in recognition of the fact that modern cargo-handling techniques had moved much of the longshoreman's work off of the vessel and onto the land; and
>
> *Second*, to assure that a uniform compensation system was applicable to employees who, without the amendments, would have been covered for only part of their work activities.

[3] Appendix B to Petition, p. 13.

The first identified theme is clearly not relevant to petitioner's claim. The use of waterfront grain elevators for the receipt, storage, and later transshipment of inland grown grains involves neither modern cargo handling techniques nor new technological developments.

Application of this Court's second recognized theme — assurance that employees who would otherwise have been covered by the Act for part of their activities be the beneficiaries of a uniform compensation system — demonstrates clearly that the decision below is in full accordance with both *Caputo* and Congress' 1972 intent.

The fact is that *never* during petitioner's seven months of employment with respondent Cargill did he perform any work activities which would have been covered under the Act before the 1972 amendments. During that seven months of employment, petitioner Powell could make no claim to being an "amphibious" worker.[4] The denial of petitioner's claim to the Act's benefits does not revitalize the shifting and fortuitous coverage that Congress intended to eliminate. The Ninth Circuit Court of Appeals decision is fully consistent with *Caputo.*

---

[4] "Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without the amendments, would be covered only for part of their activity." (432 U.S. at 273).

II.

There Is No Conflict with Other Circuit Court Decisions.

Not only is the Ninth Circuit's decision fully consistent with this Court's single decision regarding the scope of the 1972 coverage expansion, it is also fully consistent with the four post-*Caputo* Circuit Court coverage decisions.[5]

---

[5] Two of the four pertinent post-*Caputo* decisions have been issued by other panels of the Ninth Circuit Court of Appeals. *Handcor, Inc.* v. *Director, Office of Workers' Compensation Programs,* 568 F.2d 143 (9th Cir. 1978) and *Brady-Hamilton Stevedore Co.* v. *Herron,* 568 F.2d 137 (9th Cir. 1978).

In *Handcor,* a case involving injury to a member of a container "stuffing" gang, the Ninth Circuit found *Caputo* dispositive, concluding that a container stuffer, as well as a stripper,

> ". . . is a maritime employee since the work of a stuffer is the functional equivalent of loading cargo aboard ship." (568 F.2d at 144).

In *Herron,* a case involving injury to an equipment maintenance worker, the Ninth Circuit recognized that claimant Herron was truly "amphibious" and found coverage present because

> ". . . To exclude Herron from coverage in the instant case would be to reinstate the same degree of 'shifting and fortuitous coverage that Congress intended to eliminate.' 432 U.S. at 274, 97 S. Ct. at 2363." (568 F.2d at 140).

The Ninth Circuit has completely adopted this Court's coverage analysis. Petitioner Powell's claim is one for which that analysis precludes coverage.

The two[6] applicable post-*Caputo* coverage decisions, other than those authored by the Ninth Circuit Court of Appeals, are *Dravo Corp.* v. *Banks*, 567 F.2d 593 (3rd Cir. 1977) and *Newport News Shipbuilding & Drydock Co.* v. *Director, Office of Workers' Compensation Programs*, 4th Cir., Docket No. 76-2297, March 13, 1978.[7]

The Third Circuit Court of Appeals was faced with a case arising out of an injury to a plant maintenance worker assigned on the day of injury to spread salt on walkways and steps wherever he saw ice. Coverage was denied because Banks' duties had "no traditional maritime characteristics" and no close functional nexus between Banks' work assignments and the comprehensive shipbuilding operation existed.

---

[6] A third decision, issued by the Fifth Circuit Court of Appeals on the day preceding this Court's opinion in *Caputo*, is also pertinent because of this Court's rejection of the employer's petition for certiorari on October 17, 1977. That decision, *Alabama Dry Dock Shipbuilding Co.* v. *Kininess*, 554 F.2d 176 (5th Cir. 1977), cert. den., — U.S. —, — S. Ct. —, 54 L. Ed. 2d 190, is also fully consistent with the views expressed by the Ninth Circuit Court of Appeals. Kininess was injured while sandblasting a disassembled crane to remove rust before reassembling and use in the direct shipbuilding process. As did the Ninth Circuit in *Herron*, the Fifth Circuit Court of Appeals found coverage present because Kininess' maintenance functions were "an essential aspect" of his employer's ship repair and shipbuilding enterprise.

Far from being an "essential aspect" of any longshoring activity, petitioner Powell's work had "no involvement whatsoever with the loading and unloading of ships."

[7] The opinion of the United States Court of Appeals for the Fourth Circuit has been unofficially reported at 8 Benefits Review Board Service (BRBS) 241.

> "Clearing ice is necessary 'incident' of *any* operation. We suggest that in order to be covered, Banks' job should have been a necessary *'ingredient'* in the shipbuilding process, which it was not." (567 F.2d at 595-96).

Application of the Third Circuit's analytic approach to petitioner's claim to the Act's benefits would result in a denial of coverage. Petitioner Powell's work activities had no "close functional nexus" with longshoring.

> "He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea." (Appendix B to Petition, p. 13).

Although a plausible "incident" to any operation requiring the receipt of materials, Powell's work cannot be characterized as a necessary "ingredient" of any longshoring process.

In *Newport News*, the Fourth Circuit Court of Appeals was faced with two claims, one presented by a worker involved in fabricating a component part of a submarine and the other involving a worker injured while maintaining machines used in vessel construction. The Fourth Circuit concluded that both activities were "integral" and "essential" parts of the vessel construction process.

The Ninth Circuit's denial of coverage to Powell — a worker having "no involvement whatsoever with

the loading and unloading of ships" — is fully consistent with the "integral part" test established by the Fourth Circuit Court of Appeals.

Whether viewed as an "ingredient," "integral part," or "essential aspect," it is clear that the Courts of Appeal for three major maritime Circuits have adopted the view that employment is "maritime" within the meaning of Section 2(3) of the Act only if the employment bears a significant relationship to the traditional maritime activities covered by the Act. That view, as expressed by this Court in *Executive Jet, supra,* at 268, has been adopted and followed by the Ninth Circuit in an earlier coverage case under the Act:

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. See *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). See also *Onley* v. *South Carolina Electric & Gas Company,* 488 F.2d 758 (4th Cir. 1973), and *Crosson* v. *Vance,* 484 F.2d 840 (4th Cir. 1973)." *(Weyerhaeuser Company* v. *Gilmore,* 528 F.2d 957, at 961, cert. den. 429 U.S. 868).

All reviewing Courts have required that the worker's activities bear a significant relationship to the maritime occupational groups covered by the Act.[8] The Ninth Circuit's denial of benefits to petitioner Powell, a worker having "no involvement whatsoever" with any such occupational group, is both consistent with other decisions and clearly correct.

CONCLUSION

The decision below is fully consistent with Congress' 1972 intent, this Court's decisions in *Caputo* and *Executive Jet,* and all post-*Caputo* coverage decisions. The decision reflects an accurate application of *Caputo's* coverage guidelines to a particular work situation. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted this .....day of June, 1978.

DENNIS LINDSAY
ROBERT BABCOCK
Attorneys for Respondents

LINDSAY, NAHSTOLL, HART, NEIL
& WEIGLER
Of Counsel

---

[8] "The Act focuses primarily on occupations — longshoreman, harbor worker, shiprepairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage to these amphibious workers. . . ." (432 U.S. at 273).

Supreme Court, U. S.
FILED
JUL 24 1978
MICHAEL RODAK, JR., CLERK

No. 77-1543

In the Supreme Court of the United States

OCTOBER TERM, 1978

KENNETH E. POWELL, PETITIONER

v.

CARGILL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1543

KENNETH E. POWELL, PETITIONER

v.

CARGILL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

---

1. Petitioner, a longshoreman for 17 years, was injured while unloading grain from a railroad car at respondent Cargill's dockside terminal in Portland, Oregon. At the time of his injury, petitioner had worked for Cargill at its grain exporting facility for approximately seven months. He had been hired as a "key man," which meant that he could perform a variety of tasks involved in the operation and maintenance of the grain handling equipment at the terminal.[1] During most of the time he worked for Cargill, he was involved in unloading grain from incoming rail cars. After the grain was removed from the rail cars, it would either be loaded directly onto waiting ships or be stored for subsequent loading (Pet. App. 4-6).

---

[1]Petitioner's work as a "key man" at Cargill did not include work aboard the ships. That work was performed by an independent stevedoring company (Pet. App. 5, 27).

Following his injury, petitioner filed a claim for workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. and Supp. V) 901 *et seq.* The administrative law judge denied his claim on the ground that petitioner was not engaged in maritime employment at the time of his injury and was therefore not an "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. (Supp. v) 902(3) (Pet. App. 35-46). The Benefits Review Board reversed (Pet. App. 23-34). In the Board's view, petitioner's task of unloading grain from railroad cars at the terminal was the first step in a longshoring operation and thus was "maritime employment" within the meaning of Section 2(3).

A divided panel of the court of appeals reversed the Board's decision (Pet. App. 3-22). The court held that even though petitioner was injured at the situs of longshoring operations—within Cargill's marine terminal—he was not engaged in maritime employment. His rail car unloading work, the court held, was "more oriented to the rails than to the sea" (*id.* at 13), and he therefore was not "engaged in longshoring operations" so as to qualify for benefits under the Act. The dissenting judge, concluding that petitioner's claim was controlled by this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, would have affirmed the Board.

2. The Director of the Office of Workers' Compensation Programs believes that the court of appeals erred in reversing the decision of the Benefits Review Board. First, both the Director and the Benefits Review Board are of the view that all physical cargo handling activity within a marine terminal area is "maritime employment" within the meaning of Section

2(3) of the Act, and employees engaged in those activities are therefore covered by the Act.[2] Under this test petitioner's employment was "maritime," and he is eligible for benefits.

Second, the decision below is inconsistent with *Caputo*. The Court there held that Caputo was covered by the provisions of the Act because as a matter of occupation he was a "longshoreman" who spent at least some of his time in indisputably longshoring activities. 432 U.S. at 273. Because Caputo was regularly a member of a stevedoring gang and on the day of his injury was working as a terminal laborer who could have been assigned to "any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation" (*ibid.*), the Court concluded that providing coverage only when he was actually engaged in longshoring operations would defeat the intent of Congress (*id.* at 274).[3]

In seeking to distinguish petitioner's case from Caputo's, the court of appeals noted that Caputo was subject to assignment to a number of different tasks in the terminal in a single workday, while petitioner had worked mainly at the rail unloading site during his employment with Cargill. But even on a narrow reading of this Court's opinion in *Caputo*, this distinction is unsatisfactory. Petitioner was a longshoreman by trade, and Cargill hired him in that capacity. Moreover, he was hired as a "key

---

[2]See Brief for Federal Respondent, p. 20, *Northeast Marine Terminal Co.* v. *Caputo, supra.* The Court in *Caputo* declined to pass on whether this is the correct test for "maritime employment." See 432 U.S. at 272-273.

[3]The Court reviewed in detail the effect of the 1972 amendments to the Act, which expanded the Act's coverage to include employment injuries sustained in waterfront land areas by workers engaged in "maritime employment."

man" to do any work within the terminal elevator premises, including pulling grain from storage and directing it out of a spout into ships' holds. Although the record reflects that he was usually assigned to the task of unloading the incoming rail cars, he had at times been assigned to pull grain from storage for loading into waiting ships, and he was subject to being assigned to such work at any time. In analyzing Caputo's work assignment scheme, this Court did not rely on any actual variation in Caputo's duties but found dispositive the fact that he was subject, by the nature of his employment, to being assigned at any time to tasks that indisputably constituted "longshoring operations." Petitioner, a longshoreman by trade and by the terms of his hiring, was subject to a similar variety of assignments, even if he spent most of his time unloading grain cars at the terminal facility.

Finally, the decision of the court of appeals conflicts with *P.C. Pfeiffer Co.* v. *Ford* and *Ayers Steamship Co.* v. *Bryant*, reported *sub nom. Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (C.A. 5), vacated and remanded, 433 U.S. 904, adhered to on remand, 575 F. 2d 79.

In *Bryant*, the court held that the Act covers a cargo handler who, although not denominated a longshoreman, unloaded cotton from wagons at a warehouse immediately adjacent to a pier. As in the instant case, the goods were generally stored in the warehouse until, at some later time, members of stevedoring gangs loaded the goods onto waiting vessels. 539 F. 2d at 544. In *Ford* the court held that the Act covers an employee who was injured while loading a rail car in the waterfront area with cargo that had previously arrived on a seagoing vessel. This work, the court held, was "an integral part of the process of moving maritime cargo from a ship to land transportation," and it therefore fell within the

coverage of the Act, 539 F. 2d at 543. The work of the cargo handlers in *Bryant* and *Ford* was thus identical in every important respect to petitioner's work. There is one difference, however: petitioner was a longshoreman by trade, and Bryant and Ford were not. If there is to be any difference in the judicial treatment of the cases, that difference should be in petitioner's favor.

It is our outderstanding that a petition for a writ of certiorari will be filed in *Ford* and *Bryant*. Because we believe that the decision in the instant case is irreconcilable with the decision of the Fifth Circuit in *Ford* and *Bryant*, we suggest that the Court hold this case for consideration together with *Ford* and *Bryant*, and that the Court grant review in one or more of these cases to resolve this important issue that has divided two major deep-water circuits. It may be advantageous for this Court to hear *Ford* and *Bryant* instead of the present case; because neither Ford nor Bryant was a longshoreman by trade, those cases would allow the Court to resolve the question it reserved in *Caputo* (see pages 2-3, *supra*, and note 2). That decision can be made best, however, after the petition in *Bryant* and *Ford* has been filed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

JOSHUA T. GILLELAN, II,
Attorney,
Department of Labor.

JULY 1978.

DOJ-1978-07